

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

LOUIS PSIHOYOS and JAMES P. REED,

Plaintiffs,

v.

PEARSON EDUCATION, INC. et al.,

Defendant.

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Case No. 10-CV-5912-JSR

Hon. Jed S. Rakoff

Electronically Filed

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Namita E. Mani (NM-0814)
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
(212) 309-6000
(212) 309-6001 (facsimile)

David W. Marston, Jr. (*pro hac vice*)
Ezra Dodd Church (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000
(212) 963-5001 (facsimile)

DATED: September 12, 2011

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 1

III. ARGUMENT..... 3

 A. Legal Standard..... 3

 B. Statutory Damages and Attorneys’ Fees are Not Available for “Tyrannosaurus Being
 Cleaned,” Because It Was Registered After the Alleged Infringement Began..... 4

IV. CONCLUSION..... 5

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986).....	3-4
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986).....	3
<u>Fournier v. McCann Erickson</u> , 202 F. Supp. 2d 290 (S.D.N.Y. 2002).....	5
<u>Troll Co. v. Uneda Doll Co.</u> , 483 F.3d 150 (2d Cir. 2007).....	4-5
STATUTES	
17 U.S.C. § 412.....	4
OTHER AUTHORITIES	
Fed. R. Civ. P. 56.....	3

I. INTRODUCTION

Plaintiffs Louis Psihoyos (“Psihoyos”) and James P. Reed (collectively “Plaintiffs”) allege that Defendant Pearson Education, Inc. (“Pearson”) published four of their photographs in educational textbooks without first obtaining permission. Plaintiffs also allege that three printers, R.R. Donnelley & Sons Co., Courier Corporation (“Courier”), and Failsafe Disk Company d/b/a Failsafe Media (“Failsafe”) are liable for copyright infringement with respect to their role in printing the textbooks containing the four photographs. Defendants have asserted various defenses to these claims that they will seek to prove at trial of this matter. One issue, however, is ripe for summary judgment.¹ The Psihoyos photograph “Tyrannosaurus Gets a Cleaning” (also called “Tyrannosaurus Being Cleaned”), was not registered with the United States Copyright Office before it was printed in Pearson’s textbook. Therefore, Psihoyos is unable to recover statutory damages and attorneys’ fees under the Copyright Act with respect to that photograph as a matter of law.

II. STATEMENT OF FACTS

Pearson publishes educational textbooks and other materials. See Docket No. 39 ¶ 18. Psihoyos is a professional photographer. See Docket No. 39 ¶ 16. Pearson used the photograph “Tyrannosaurus Gets a Cleaning,” in an educational textbook titled Intervention Student Reader, Sidewalks, 4.2, ISBN 0328452874, published on [REDACTED]. See Church Decl., Exs. A & B. The textbook and related educational products containing this photograph were printed by Courier and Failsafe. See Church Decl., Ex. B. Courier first printed the image on [REDACTED]. See Church Decl., Ex. B. Failsafe reproduced the image in a derivative electronic product on [REDACTED]. See Church Decl., Ex. B.

¹ By making this motion, Pearson is not waiving any argument as to the validity of the copyright registration for the images identified in the complaint.

Psihoyos contends that Pearson's use of his photograph and the printing of the textbooks and other educational products containing the photograph by Courier and Failsafe was done without permission and constitutes copyright infringement. See Docket No. 39 ¶¶ 27, 31-33, 105-08, 138-39. Psihoyos seeks statutory damages and attorneys' fees with respect to his claims for relief. See Docket No. 39 at 19.

The initial complaint, filed August 5, 2010, unequivocally alleged that: "Psihoyos registered copyright in his 'Tyrannosaurus Being Cleaned' photograph with the United States Copyright Office." See Docket No. 1 ¶ 12. Plaintiffs did not, however, provide copyright registration numbers or registration certificates to substantiate that allegation. Pearson requested registration numbers by letter after it received the Complaint. See Church Decl., Ex. C. Plaintiffs refused to provide them. As a result, Pearson filed a motion to dismiss the Complaint based on Plaintiffs' failure to sufficiently allege copyright registration. See Docket Nos. 5 & 6. On November 10, 2010, the Court ordered Plaintiffs' counsel to produce the registration numbers by November 15, 2010. See Docket No. 15. Plaintiffs' counsel did not comply with that Order. On November 22, 2010, the Court ordered Plaintiffs' counsel, on pain of contempt, to produce the registration numbers for the four photographs by November 24, 2010. See Docket No. 20.

On November 24, 2010, Plaintiff submitted a letter to Pearson and the Court representing that: "Mr. Psihoyos' photograph entitled 'Tyrannosaurus Being Cleaned' . . . which also is referred to as 'Tyrannosaurus Gets a Cleaning'—is covered by registration 1-516728461." See Church Decl., Ex. D. The number Plaintiffs' counsel provided, however, was not a copyright registration number; it was the "service request" number for their *application for copyright*

registration of “Tyrannosaurus Gets a Cleaning,” an application that was not submitted until November 9, 2010. See Church Decl., Ex. E (PL000088-89).

At his deposition, Psihoyos claimed that he believes the photograph was registered earlier under the Corbis Copyright Registration Program, but conceded that this was simply his “recollection” and that he does not have any documents proving that such registration took place. See Church Decl., Ex. G. He also conceded that his contract with Corbis, which he produced in discovery, was not applicable to “Tyrannosaurus Being Cleaned.” See Church Decl., Ex. H. Moreover, correspondence between Plaintiffs’ counsel and Corbis, produced in this case, indicates that “Tyrannosaurus Gets a Cleaning” was not registered through the Corbis program at all. See Church Decl., Ex. I (PL000283-285). Thus, the only evidence of actual copyright registration for the photograph “Tyrannosaurus Being Cleaned” or “Tyrannosaurus Gets a Cleaning” indicates that the image was first registered on November 9, 2010, more than three months after the initial Complaint was filed and after representations to the Court that a valid registration was already in place.

III. ARGUMENT

A. Legal Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted where the discovery record demonstrates that “there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 n.4 (1986). Summary judgment is also appropriate where a party fails to offer admissible evidence sufficient to establish the existence of any matter on which it bears the burden of proof. See id. at 327. Federal courts are required to grant summary judgment unless the non-moving party comes forward with affirmative evidence which clearly demonstrates that there exists a genuine issue of material fact to be tried. Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 248 (1986). A “material fact” is one that will affect the outcome of the lawsuit under the governing law, and the dispute is “genuine” if the evidence would allow a reasonable jury to return a verdict for the non-moving party. Id. at 248. Once the moving party demonstrates that there are no genuine issues of material fact with respect to the plaintiff’s claims, the burden shifts to plaintiff to provide “concrete evidence from which a reasonable juror could return a verdict in his favor.” Id. at 256. Here, there is no genuine issue of material fact related to copyright registration of “Tyrannosaurus Being Cleaned,” and an award of statutory damages or attorneys’ fees is precluded as a matter of law.

B. Statutory Damages and Attorneys’ Fees are Not Available for “Tyrannosaurus Being Cleaned,” Because It Was Registered After the Alleged Infringement Began.

Psihoyos seeks an award of “statutory” damages and “attorneys’ fees” in connection with his claims. Docket No. 38 at 19. Psihoyos cannot obtain such relief as a matter of law with respect to his photograph “Tyrannosaurus Being Cleaned,” because the photograph was not registered until after the alleged infringing use of the photograph began.

The Copyright Act states: “[N]o award of statutory damages or attorney’s fees as provided by sections 504 and 505, shall be made for— (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration” 17 U.S.C. § 412. When a pattern of infringing conduct begins prior to the effective date of the applicable registration, awards for statutory damages and attorneys’ fees are not available even if the allegedly infringing conduct continues after registration is accomplished. See, e.g., Troll Co. v. Uneeda Doll Co., 483 F.3d 150, 158 (2d Cir. 2007) (“[A] plaintiff may not recover statutory damages and attorney’s fees for infringement occurring after registration if that infringement is part of an ongoing series of infringing acts and the first act

occurred before registration.”). For example, in Fournier v. McCann Erickson, Judge Marerro granted summary judgment dismissing plaintiff’s claims for statutory damages and attorneys’ fees on the ground that the alleged infringement of the plaintiff’s photograph commenced before the effective date of copyright registration. 202 F. Supp. 2d 290, 297-99 (S.D.N.Y. 2002, Marrero, J.). In particular, the court rejected plaintiff’s attempts to circumvent the Section 412 bar by arguing that each appearance of the allegedly infringing photograph in a magazine advertisement was an independent act of infringement, holding that “commencement” of the infringement for purposes of Section 412 occurs when the first act in a series of acts constituting continuing infringement occurs. Id.

“Tyrannosaurus Being Cleaned” was registered with the United States Copyright Office on November 9, 2011. See Church Decl., Ex. F. According to Plaintiffs’ own complaint and the evidence produced in discovery, Pearson’s alleged infringement began when the image was published by Pearson in May 2009. See Docket No. 39 ¶¶ 27, 105-08; Church Decl., Ex. B. Likewise, the alleged infringement by Courier began on [REDACTED] when the publication was first printed, and the alleged infringement by Failsafe began when it reproduced the image on a DVD on [REDACTED] See Church Decl., Ex. B. In each case, the alleged infringement commenced before Psihoyos registered copyright for “Tyrannosaurus Being Cleaned.” Indeed, the alleged infringing use occurred even before Psihoyos submitted his application for copyright registration. Thus, under 17 U.S.C. § 412, Psihoyos cannot obtain an award of statutory damages or attorneys’ fees with respect to that photograph.

IV. CONCLUSION

There is no genuine issue as to any material fact and Defendants are entitled to judgment as a matter of law concerning Psihoyos’ claim for statutory damages and attorneys’ fees with respect to the photograph “Tyrannosaurus Being Cleaned.”

DATED: September 12, 2011

/s/ David W. Marston, Jr.
David W. Marston, Jr. (pro hac vice)
Ezra D. Church (pro hac vice)
MORGAN, LEWIS & BOCKIUS, LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000
(215) 963-5001 (facsimile)

Namita E. Mani
MORGAN, LEWIS & BOCKIUS, LLP
101 Park Avenue
New York, New York 10178
(212) 309-6000
(212) 309-6001 (facsimile)

*Attorneys for Defendants Pearson Education, Inc.,
Courier Corporation, and Failsafe Disk Company
d/b/a Failsafe Media*

CERTIFICATE OF SERVICE

I, Ezra D. Church, do hereby certify that on September 12, 2011 a true and correct copy of the foregoing Defendants' Memorandum in Support of Motion for Partial Summary Judgment, Statement of Material Undisputed Facts, [Proposed] Order, and Declaration of Ezra D. Church including exhibits was served on the following counsel for Plaintiff Louis Psihoyos by ECF:

Danial Nelson
dnelson@nelsonmcculloch.com
Kevin P. McCulloch
kmcculloch@nelsonmcculloch.com
Nelson & McCulloch LLP
The Chrysler Building
405 Lexington Avenue, 26th Floor
New York, New York 10174

DATED: September 12, 2011

/s/ Ezra D. Church